

# INFORMATION

F O R

STEWART ABERCROMBIE Pannel,

A G A I N S T

Mr. Robert Hay of Naughtoun, and His Majesty's Advocate, for His Highness's Interest.



THE Indictment raised at the Instance of the saids Pursuers, against the Pannel, charges him as guilty of the Murder of the deceased *Alexander Hay*, Son to the said Mr. *Robert Hay* of *Naughtoun*, in so far as the Pannel having conceived a deadly Hatred against the said Defunct, did upon the *Friday* the 6th of *December*, or one or other of the Days of the said Month, kill and murder him upon the High Street of *Edinburgh*, near to the Head of *Black-Friar's Wynd*, by giving him a mortal Wound with a Sword, or some other deadly Weapon, upon the Left-Side, near the Insertion of the pectoral Muscle on the left Arm, whereof he died in an Hour, or some short Time thereafter: Or, the said Pannel was *Art and Part* thereof. And then proceeds to enumerate a great Number of Circumstances and Qualifications, one or more of which, the saids Pursuers pretend are sufficient, if found proven, to fix the Guilt of the Murder of the said *Alexander Hay* upon the Pannel: So that if either the actual Murder, or that the Pannel was *Art and Part* thereof, or the said Circumstances, one or more, be found proven by the Verdict of an Assize, he ought to be punished with the Pains of Death, and Confiscation of Moveables, to the Terror of others.

When this Action was called before the Lords Commissioners of Justiciary, the Procurators for the Pannel, did not plead against the Relevancy of the Indictment, in so far as it is founded upon the Commission of the Fact of giving the mortal Wound as libelled, nor indeed against the General, of being *Art and Part*; they willingly yield to the Pursuers, that a Crime, in its own Nature so atrocious, ought to be punished; and they would by no Means be thought to put in a Plea for Murder; but at the same Time took Notice, that since there are special Circumstances libelled to infer *Art and Part*, it ought not to be sustained as relevant, distinct from the Relevancy upon the Facts set down in the Indictment.

They did indeed contend, and they hope upon good Grounds, that a presumptive Proof was not strong enough to support the heavy Conclusion of the Libel, and that the Circumstances in the Libel laid down, do not bear such Conviction along with them, as both Law, Reason, and Humanity do require, before either Judges or a Jury can proceed to the severe Sentence of *Death*.

The Information given in for the Pursuers is ushered in by a Preamble, containing aggravating Circumstances of the Crime, setting forth *the intire Friendship that had formerly been between the Pannel and Defunct, and that the Crime did not seem to have been committed ex iracundiæ calore, but treacherously in calm Blood*. As to which the Pannel's Procurators beg Leave to take Notice, that the more barbarous the Crime is represented, and the more contrary to Human the greater Evidence is necessary to take off the Presumption of Innocence, for every Man to gain the Belief of others, who cannot bear the Thought of Things without Horror: *Quanto majora sunt, quæ credenda sunt, tanto magis indubitatè indiciis indigere*, is a certain and undeniable Truth.

It is the Pannel's very great Misfortune, even with Regard to the clearing of his Innocency, that he is charged with a Crime not only atrocious, but chocking humane Nature; his Appearance in the Pannel for an Offence of this kind, naturally gives an Aversion to him; nor have his Defences, tho' of greater Weight

Weight, that Effect in the Balance with the Circumstances advanced against him ; the Ties of Humanity, and the Interest every one thinks he has in having Offenders of this Kind discovered, and brought to condign Punishment, does insensibly raise their Passions, and heat their Imaginations, and are thereby hurried into the Belief that Persons are guilty, against whom there is no full Evidence, and rather than miss an Object of Punishment, are ready to catch at Suspicions ; from which they work themselves up to a firm Perswasion, upon Motives, when coolly examined, that ought not to determine a reasonable Man, and so by too great Eagerness to prevent and punish Murder, fondly venture imbruing their Hands in innocent Blood.

This was thought the more proper to be mentioned in this Case, because the Crime is to be fixed upon the Pannel by *Presumptions*, which indeed are nothing else but *Conjectures, and probable Conclusions*, of which, as there is no fixed Standard, so they are of greater or less Weight, according to the Strength of the *Imagination* of those to whom they are proposed.

This being premised, the Pannel denying the Libel, and hail Qualifications thereof, pretends, 1<sup>mo</sup>, That *Presumptions*, however strong they may appear, can never amount to such a Proof, as thereon a *Sentence of Death* can follow, especially for a Crime committed in the High Street of *Edinburgh, lucente luna*, and in Presence of a multitude of People. 2<sup>do</sup>, That the Facts or Circumstances laid down in the Indictment, are so faint Qualifications, that from them, not even the *most occult Crime* ought to be fixed upon any Pannel whatsoever.

As to the *First*, the Pannels Procurators contend, they are supported by the Authority of the greatest Lawyers both at Home and Abroad, and by the Practice of many of the most famous Judicatories in *Europe*, and that their Opinion is founded upon *Natural Equity and good Reason*.

It has been ever sustained as a good Defence against a Libel, when the Crimes contained in the *Proposition*, or the Facts from which they are inferred, did not fall directly under the Law ; but by *Implications, Inferences or Consequences* ; and it is at least, as hard, that the Facts in the *Subsumption* should only be instructed by *Consequences and Reasoning* ; nay, it seems much harder, in Regard the Nature of Crimes are fix'd and more certain, whereas Circumstances and Presumptions are Arbitrary and very uncertain.

While Judges and Juries pursue Truth in the *plain Road* confirmed by Scripture, from the Mouth of *Two Witnesses*, there is little Danger of Error ; but when they trace it by Circumstances, which at best are but By-ways, there is great Danger of being misled, and the Pursuers seem to be much mistaken, when they pretend that a Proof by connected Circumstances, is stronger and more convincing, than even the Depositions of Two or Three concurring Witnesses ; for as to the Danger of Perjury, that is still equal in a Proof upon Circumstances, the Witnesses may perjure themselves in deposing as to these, as well as upon the Facts directly inferring the Crime ; and the Multitude of Witnesses necessary in the first Case, makes the Hazard still the greater ; and as the Connection of Circumstances depend upon Reasonings, where there are *Voids* still to be filled up by People's Imaginations, there is a further and very great Danger, which makes it far from affording so convincing an Evidence of the Truth. To give an Instance of this in the present Indictment, your Lordships are intreated to take Notice, That in the framing of it, several Circumstances are thrown in to help weaker Conceptions, and lead the Fancy along : And by this Means thinking they have gain'd the Assent of the Mind, these Circumstances are thrown out, because indeed they are such as cannot be proven, and yet they were thought necessary to link this Chain of Circumstances together, which indeed is curiously and with great Art wrought up : And allowing the Standard of Judging in those Cases, to be Evidence sufficient to convince the Judge ; still 'tis contended that *Presumptions* never afford other than probable Conclusions, Fifty, nay, a hundred of them can never make a Demonstration ; so that still the Argument for the Pannel on this Head, remains in full Force, that besides the uncertainty that must from the Nature of Things arise, from the Danger of perjury, which is to be found in both Cases, greater in the case of the Multitude of Witnesses, there is another and much greater uncertainty in that Case of Presumptions, because allowing them all to be true, and that the Testimonies are yet still the Pannel may be Innocent.

To clear this Defence, It is proper to set down the *lex. ult. Cod. de probationibus*, where the Emp. says, *Sciant omnes accusatores eam se rem deferre, in publicam notationem debere quæ munita sit idoneis testibus, vel instructa apertissimis documentis vel indicijs ad probationem indubitatis, et luce clarioribus expedita*. By this Law, Evidence in the strongest Terms is required as necessary in Criminal Cases; no Demonstration is clearer than what is express as necessary, to wit, evident as the *Sun*, and therefore nothing less than absolute Demonstration, which can admit of no Possibility of the contrary being true, ought to be admitted to Support the Conclusion of a criminal Libel: And tho' the Pursuers catch at the word *indicia*, as a Warrant for their presumptive Proof, yet they would be pleased to reflect, that *indicia* and *Presumptiones* are very different, and so *Duarenus* upon the Title *de probationibus*, Cap. 3. excludes all *Presumptions* in Criminals and by *iudicia* understands only such Things as are *natural* and *necessary Consequences* of the Fact; and to show this by Example, Instances in the Case, when one would prove *mulierem corruptam esse*, by this, that she has Milk in her Breasts: This cannot possibly be according to the Nature of things without the Fact charged upon her, and so is quite different from Presumptions, which admit of Uncertainty, even according to the Course of Things, and afford a Suspicion, but no full Evidence; so that if by Presumptions the Pursuers mean Signs and Demonstrations in the Sense *Duarenus* mentions, which is plainly the true Meaning of the Law, tho' the general Point be yielded, it will not apply to their particular Case, as shall be afterwards made appear.

From this the Pannel concludes, That Presumptions in the Sense the Pursuers plead them, are no more than *Conjectures* or *Suspensions*: And therefore, as *Ulpian* very well says in the *Lex 5. ff. de Pœnis*, *Nec de suspicionibus debere aliquem damnari, Divus Trajanus Assiduo severo rescripsit; Satiù enim est impunitum facinus nocentis relinqui, quam innocentem damnare*; which plainly amounts to this, That if a demonstrative Proof cannot be had against a Criminal, he ought to be absolved, for this notable and undeniable Reason, *That 'tis much better that a Crime should remain unpunished, than that Judges should run the Risque of condemning a Person that possibly may be innocent*: And this the Wisdom of the Roman Law push'd so far, that the great and good Emperor *Constantine*, in the *L. 16. Cod. de Pœnis*, has it as follows, *Qui sententiam latuitus est, temperamentum hoc teneat, ut non prius capitalem in quempiam promat, severamque sententiam, quam in adulterii, vel homicidii, vel maleficii crimine, aut sua confessione, aut certe omnium qui Tormentis vel Interrogationibus fuerint dediti, in unum conspirante concordanteque rei finem, convictus sit; Et sic in objecto flagitio deprehensus, ac vix etiam ipse, quæ commiserit, negare sufficiat*: So that the Proof, especially in capital Cases, ought to be so clear and convincing, that even the Criminal himself cannot have the Assurance to refuse what is laid to his Charge.

*Antonius Faber*, an eminent Lawyer, both for his Knowledge of the Civil Law, and who had long Experience in the Practice, in his *Codex Fabrianus, Tit. de Pœnis Definit. 6.* is very express, That *Non potest sequi condemnatio ad penam mortis, ex indicijs quantumlibet indubitatis*. And it is in vain for the Pursuers to reason, That either the Criminals ought intirely to be absolved, or underly the severest Penalties of Law; which are not mitigated by the Manner of Probation, but the Nature of the Crime; in regard sometimes Circumstances are made out against Pannels, which in themselves raise Suspensions, and are irregular. In such Cases, Judges do, and may punish because of them, altho' they do not make out the Crime of which the Criminal by them becomes suspect: Thus Pannels are banish'd, *non solum propter scandalum quod bonis viris inde accidit, sed etiam ne ex malorum conversatione boni periclitentur*: And therefore when it's possible the suspicious Circumstance may be true, and yet the Pannel innocent, it is reasonable, to the Terror of others, to proceed as far to punish as is possible, without running the Hazard of *Blood-Guiltiness*.

It seems strange, That the Pursuers should plead their Presumptions so high, as to make no Difference betwixt *Civil* and *Criminal* Cases: That does not appear to be the Opinion of any Lawyer that has hitherto written upon that Subject; nor is it, with Submission, founded in Reason: For where the Controversy is as to the Property of any Thing, a Decision must be given; and therefore the

str. noest

strongest Presumption must necessarily carry it ; but in Crimes, tho' it's reasonable, they should be punisht ; yet in case of no demonstrative Evidence, it's far better *the Guilty escape, than the Innocent suffer.*

To this Purpose, *Antonius Mornacius* in his Observations upon the *Lex 6. Cod. de Dolo*, it is very clear, that even *ex indicis*, which are necessary Consequences of Facts inferring the Crime, and so stronger than *Presumptions*, Sentence of Death was never pronounced in the Parliament of *Paris*. And there relates the Case of a Criminal, whose Name he does not mention, but was accused *ex indicis, ut videbatur, certissimis ac indubitatis*, that he had assaulted in the Night-Time a Relation of his, whose Domestick he chanced to be at the Time : And yet when his Case was advised of Sixteen Judges, who were present, *Tres tantum ausi sunt nigrum præfigere Theta*. And this Opinion is likewise confirm'd by *Molineus, Ad legem favorabiliores, ff. de Regul. Juris*.

The Pannels Procurators did likewise alledge the Authority of *Bernard Antonius* in his Conference *du droit Francois Avec le Droit Romain*, who treating of the *Lex Ult. Cod. de probationibus*, mentions a Decision in the Case of *John Gerard de Polly*, who was kill'd in a Road by an Arrow; his Servant did depone, That he who drew the Bow at him, did resemble One named *Guiot Guydon*, a Neighbour. 2do, It was proven, That this *Guydon* kept the Defunct's Wife. 3tio, The Arrow drawn out of the dead Body, did fit exactly a Bow that was found in his Custody ; and yet the Judges would not condemn him to Death, nor indeed to any Punishment : For, being put to the Back, he stood to his Innocence. And it makes nothing for the Pursuer's Purpose, what is alledged from a Decision related there, immediately before : First, Because the Lawyer takes notice, That it was far from being an unanimous Decision. 2do, The Defunct's Finger was cut off, on which he had a Ring that the Pannel had sold, as he had likewise done his Watch, and taken his Money. These are such *indicia*, as show, not only his being guilty of the Crime, but likewise the *Animus* or Design, *viz. Robbery*. And 3tio, He fled, which, of it self, is stronger than all the Presumptions laid together contained in the Indictment; for he who flies, *suspectus sua Sententia factus est, inquit Ulpianus, Fatetur facinus qui iudicium fugit*. And this may serve to take off what was likewise pled from the Decision of the Court of *Frizeland*, marked by *Sand*. For in that Case the Judges differed in their Opinion, and there the Person accused confest, That he who was murdered, was in the Room with him, where he received the fatal Blow, acknowledged a Quarrel with him, the *Rixa* was proven, and a scuffle *ex incontinenti*, the Defunct came out of the Room Blood-ing, in which there was no other but the Pannel and his Wife, and added to all this, *he fled immediately*, which was a Circumstance on which the greatest Strefs was laid; this is quite different from the Circumstances as laid in the Libel ; it was not possible the Defunct could have received the Blow from any besides him : Whereas it will appear, that there are many possible, nay probable Cases, wherein the Defunct *Mr. Hay* might have received the Wound from another, than he to whom the Circumstances may agree. And here the Pannel might trouble the Lords with Multitudes of Authorities, from *Mascardus, Minochus, Clarus, and Carpsorius*: But since the Pursuers in their Information seem to acknowledge this to be their Opinion, 'tis unnecessary to lose Time and Labour in alledging them. The Observation taken Notice of in the Pursuers Information as to the Difference of Procedure in Countries where Torture is allowed, from these in which it is not admitted, is of no Weight in the present Case; for even it appears, by the Decision alledged by them from *Autumnus*, that when the Probation comes up to a full Conviction. Criminals are not put to the Rack; and therefore it must still be allowed, that the Cases put by the Authors above-mentioned, agree to the Matter in Hand, or else they must acknowledge they insist to have the Pannel condemned to Death, without a full Evidence.

In Opposition to these Testimonies, the Pursuers adduce *Mattheus de criminibus, Tit. de prob. Cap. 4*. But indeed if the Example adduced by that Lawyer be considered, it will not at all avail them : The Case he puts, is, *Mevius* is killed, *Titius* is proven to have been his Enemy, and often to have not only threatned him, but made Attempts upon him, he is taken in the Place where the Murder was committed, all Blood with a bloody Sword, agreeing exactly to the Measure of the Wound, with a pale Face, and being interrogat, can give no distinct Answer, but in Confusion frys away. So that if the

Pursuers

Pursuers will be pleased to put the Issue of their Cause, of measuring their Circumstances with those laid down by the Champion of their Cause; the Dispute would very soon be at an End: But the Truth is, *Mattheus* lays down not only the strongest Presumptions, but the most undeniable *Indicia*, which it's contended the Pursuers wilfully mistake as one and the same Thing.

As to the Authority of the learn'd *Voet*. in his Comment. upon the *Pandects*, the Pursuers seem not to have with Care considered his Opinion as there set down; for the Presumptions upon which a criminal Sentence ought to follow against the Pannel, are no other in his Opinion than the *Indicia indubitata* formerly mention'd, which he says ought to be *lucē clariora*, and that he says, arises *ex criminis, ipsius qualitatibus atq; circumstantiis*: So that at most he says no more than *Mattheus*, who plainly shows his Opinion by the Example abovemention'd.

The Pannel is very well supported in this Defence, without calling foreign Aid to his Assistance; Sir George *McKenzie* in his *Criminals*, *Tit. Probation by Oath*, &c. having first set down the different Opinions of Lawyers as to this Question, and the Arguments made use of on either Side, adds, "This Difficulty has forc'd some of the Doctors to conclude, That this Case is arbitrary, and others to conclude, That Presumptions may infer *penam extraordinariam sed non ordinariam*; which last Opinion is upon the Matter coincident with the first; for in arbitrary Cases the Judges can never proceed to Death, and it seems that both these Opinions are well founded; whereby he plainly declares in Favours of those who think that no Sentence of death can follow, upon Facts proven by *Presumptions only*.

It's acknowledged, he takes Notice of some Decisions where the Parties seem to be contrary, and particularly that of *Janet Brown*, who was convict and hanged for the Murder of her own Child; and that of one *Scot* convict and hanged for killing *Dumlanrig's* Sheep; and then of *Kennedy's* Case, who was convict and hanged for Falshood upon Presumptions: but as to the first Two, the Decisions seem to have been supported *per indicia indubitata*: For as for a Woman's murdering her own Child, it is more easily presumed, because it is impossible it could be murdered by any other without her Knowledge. And so far has this sway'd, not only with our Judges, but with our Lawyers; that with Regard to it, there is a *Presumptio juris et de jure*, that admits of no contrary Probation; and so reasoning from that Decision, to Cases of the Nature of the present Question, can be of no Weight. As to *Scot*, he was taken with the Fang, *in furto manifesta*, which plainly distinguishes his Case; And as for *Kennedy*, it was still reckoned a hard Case, and being an *occult Crime*, Presumptions less strong are admitted of; those cunning Devils of false Writs, take Care to put their Frauds in Execution in Corners, and secret Places; and since there is no getting at them in the ordinary Way, they must be traced in By-Paths; so that they are condemned upon Presumptions; it is all the Evidence that the Nature of the Crime can allow of, which in *suo genere* is always reckoned a Demonstration. This can never be said with any Truth of a Crime committed in the Presence of a Multitude, who distinctly perceived all that pass. And so we see in the Civil Law, *Presumptions* were allowed of in Adultery, that in other Crimes would not have been sustained; because *crimen est quod latebras querit*; besides, Sir George *Mackenzie* mentions this as the first Case in which it was distinctly pled, how far Presumptions could support a capital Conclusion in a Libel, and so takes off any Argument can be drawn from former Decisions; besides that, the Decisions are very old, being 1619, 1616, 1662; and the Judges since have not thought fit to make them precedents, the Crimes being occult and perpetrate upon a foregoing Confidence, which cannot be alledged in this Case against the Pannel.

As for the other Decisions mentioned in the Pursuer's Information, we found that still the Circumstances sustained relevant, were such as, if true, excluded all Possibility of the Pannel's Innocence; and if this be agreed to, it is unnecessary to dispute abstract points further than they apply to the Case in Hand. It may not be improper here to take Notice, That in the Case of *Stampheld*, that occurred several and very violent Presumptions that he had murdered his Father, and yet the Lords Commissioners of Juſticiary would not sustain them relevant, but he was condemned for Treason, and his having curſed his Father. And in all Events, these concurring Testimonies of the most eminent Lawyers, and the good Reasons upon which they found their Opinions, must have that Effect, notwithstanding of any former Practice

to exclude all Probations in capital Crimes, that are not at least *per indicia*, and not founded only upon *Presumptions*, which arise from what happens often, but not alwise. And this the Pannel thinks sufficient to clear the general Defence founded on, notwithstanding of any Thing said in the Pleadings or Information, against it, to witt, That *Presumptions*, however strong they appear, never afford the Evidence necessary to determine the Lords to proceed to the Sentence of Death, especially for a Crime committed in a publick Place, while the Moon was shining clear, and perpetrated in the Sight of a Multitude of People; and even allowing the few Authorities adduced on the Pursuers Side, to over-balance the great Number of eminent Lawyers that stand for the other Side of the Question: Yet when their Doctrine is applied to this circumstantiat Indictment; it cannot fail to be obvious that the Qualifications are too weak to support the Conclusion, even tho' this were an occult Crime.

The Pursuers have in the Information picked out some of the Circumstances contained in their long Libel, and dropt the rest, which were brought in, partly with a Design to preclude the Pannel from some Defences, and partly to guide the Imagination in the several Steps of their pretended Demonstration; and when these material Circumstances, as they are call'd, are duly considered, they will be found light in the Balance.

To proceed in Order, the first Thing mentioned is an anterior Quarrel betwixt the Defunct and the Pannel. As to which it was answered for the Pannel, *First*, The Grounds laid down to infer the same can never prove *inimicitia capitales*, such as only can be sustained as a Presumption of any Weight in a Presumption of this Kind. That this Kind of Quarrel can only enter into the present Question, might be vouch'd by unquestionable Testimonies; but since the Pursuers seem to yield it in their Information, to avoid Affectation, no more shall be said on that Head. Now if the Circumstances, as laid in the Inditement, be examined, the most that by a Stretch they can be brought to is, to give the Appearance of a *rixa*, which is never reckoned to have any future Consequences, if nothing follow *ex incontinenti*: And indeed all there laid down might have happened amongst People that lived in Friendship, and of less polite Conversation, *ex lascivia* only. The Pannel is said to have risen from his Seat, where the Defunct let himself down; the Pannel, returning, pulled off his Periwig, and took him by the Nose. This, 'tis acknowledged, was not very mannerly, and yet is often practis'd by young People, especially at their Drinking-bouts, and yet they remain in intire Friendship; and at least the Pannel cannot be supposed to retain the least Resentment of it; and therefore can be no Argument of his conceiving a deadly Hatred against the Defunct, which is the only Purpose the anterior Quarrel can be brought into the Inditement for.

And whereas the Pursuers pretend, *That this was a Quarrel which must end in fighting, and so in the strictest Sense is inimicitia capitalis, since no Man can fight and measure his Blows.* 'Tis answered, That since it was no old Grudge, but *rixa subito exorta*, take them in their outmost Extent, nothing can be inferred from them; for suppose the Defunct as much a Man of Honour, the foolish Way of Reckoning in the World, as they please, the Challenge was in the ordinary Way to have been given that Night, or at least the next Day: Now the Time libelled for the Quarrel is at least six Days before they pretend he came to give the Challenge. But to take off the Pretence offered by the Pursuers, *That their pretending to fight immediately would have looked liker a Bully, than a Man that really design'd in a gentlemanly Way to do himself Justice for the Affront given.* 'Tis offered to be proven for the Pannel, That he and the Defunct did by themselves Two continue in the Room together that very Night, when James Chiesly, who, 'tis said, prevented the Consequences of the Quarrel, was gone, and had left them: Then was the proper Time to have kythed the Grudge, had the Defunct retained any Resentment: But so far were they removed from any Thing of that Kind, that they continued together in a friendly Manner for the Space of Two Hours, and did eat and drink together; and at parting, the one did borrow Two-pence from the other to pay a Share of his Club, to save the Change of Money.

This, 'tis thought, would *per se* be sufficient to show that really there was never any Quarrel between them; or if there was any *rixa*, it cannot be presumed to have had any Consequences.

'Tis offered to be proven for the Pannel, That on Sunday's Night, after leaving Yates's House, the Defunct had a real Quarrel with another Gentleman; and to show it was such, 'tis offered to be proven, That it proceeded even to the drawing of Swords. This intirely takes off what is said in the Inditement, with Regard to the Pannel's mentioning his Want of a Second to Mr. Henderson; and to it can only be applied the Defunct's desiring his Assistance as a Second, and will likewise serve to clear some other Circumstances afterwards to be taken Notice of in the Sequel of this Information.

The 2d Circumstance insisted on by the Pursuers, is, *The Defunct's being seen in the Cellar a very little before he was murdered, with the Pannel, and no other Person in the Room with him:* But, with great Submission, this is of very little Force, since it is not qualified that there was no other Person in the Cellar. Had those who saw the Murder committed, perceived the Two Persons who struggled together, come out of the Room, in which the Pannel and Defunct

were proven to have been alone; tho' they had not known the Pannel, but described him by his Clothes, the Argument would have had more Force: But to put them in a Room or Corner of a Place, where 'tis acknowledged there were many other Persons, and is known to be haunted both by People of dissolute Lives, and in which there happens a constant Change of Companies; and then to conclude from the coming out of Two Persons, not from the Room, but from the Cellar, is too wide a Consequence that therefore the Pannel was one.

The Inditement likewise notic'd, *That Mr. Hay called out Mr. Cheilly from the Company, where he and the Pannel were; and pretends, That the last diverted the former from going into the Company, by informing him that Mr. Abercromby was there.* This seems a very inconsistent Thing; for the Reason that would determine the Defunct not to go into the Company, would have been as strong to have diverted him from calling again: But this Circumstance is said not to be material, but only laid in the Inditement to connect the Story: And this the Pannel intreats the Lords would be pleased to consider; for thereby the Danger of an Inditement founded upon Stories connected by Circumstances not to be proven, will very plainly appear.

The Third Thing mentioned as material in the Information for the Pursuers, is, *That the Pannel, when he came out, or was called out of the Room from Mr. Cheilly and the other Company, with whom he was a very little before Mr. Hay was kill'd, left his Hat in the Room, where it remained till Mr. Hay came in wounded into the Cellar.* This is laid down as one of the Circumstances to point out Mr. Abercromby as the Person who actually committed the Murder. How far in that View it may be of Force, shall be taken Notice of under the next Head: But in the mean Time it may not be improper to mention, That the Pannel was in Use very often in a careless Manner, even in the Day, to walk the Streets without his Hat; and this is offered to be proven: Nor is it a Thing so very extraordinary, That People from Taverns go off without their Hats.

The Fourth Branch of the Inditement, is, *That Two Persons were seen come out of the Cellar, One of which clearly appears to have been Mr. Hay the Defunct; and were seen to go forward, quarrelling, towards the Lamp-Post, One of them wanting his Hat, the Other having a Hat upon his Head; and that he who wanted the Hat had likewise a light or brown coloured Coat, with clear Buttons upon it, was the Person who drew his Sword, and gave the Other a Stob or Push with it.* These Circumstances are gathered together, in order to point out the Pannel, as the Person who acted this Tragedy; but indeed they are so faint, that it is hoped they can make no Impression: For, as to that Part mentioning the Want of the Hat, on which the Pursuers seem Persons are said to have come quarrelling out of the Cellar, it is not possible the Witnesses can know, whether he who appeared to have no Hat, had not one below his Arm, which might indeed the Inditement makes him scrambling in the Streets for something he had lost, just before he brush'd into Blackfriars-Wynd. Neither is it so hard to conceive, as most of the Consequences which the Pursuers would have others swallow down, is Demonstrations, That in the Entrance of the Cellar a Hat might in the Scuffle have been throw'd down, and even carried off by a Mob; Hats, in such Cases commonly go first off: And therefore this Circumstance, that is put as an absolute Demonstration, is at best but a faint Qualification. The Habite is still weak for libelling a Coat of a light or brown Colour, with clear Buttons, is not much more specific than libelling a Man with a Coat, a Periwig, or a Nose upon his Face; so common is that Habite, both to People of higher and lower Stations.

The Fifth Circumstance is, *That the Person who gave the Wound, and who came from the Cellar wanting his Hat, run down Blackfriars-Wynd; and that the other run towards Mrs. Lindlay's Cellar, crying, He was murdered, and had not got fair Play; or Words to that Purpose. And that soon after he came into the Cellar, he dropt down dead; and was found to have a mortal Wound upon him.* To this, the Sixth may be join'd, *That about the Time libell'd, the Pannel called at Mr. Johnston's in the Head of Niddery Wynd, and there borrowed a Hat, pretending he had lost his own on the Street.*

The First of these can never contribute to the fixing any Guilt upon the Pannel, since it is not offered to be proven, that he was the Person who thus run down Blackfriars-Wynd: Upon the contrary, when join'd with the Second Circumstance, is a plain Ground of Exculpation. For, since at the Time libell'd, which is the Time the Murder was committed, he was at the Head of Niddery's Wynd, it's a Defence of him intirely exclusive of the Libel. And truly their Story seems here to be very ill connected: For, is it to be thought, that the Person guilty of the Murder would have run down one Wynd, and up another, to borrow a Hat in the way, and Confusion he must then be supposed to have been in? But, to take this intirely off, or rather to show the absolute Force of this Defence, it's offered to be proven for the Pannel, That such a Person as is described to have brush'd off by Blackfriars-Wynd, was seen running in the Gate near the Foot of the Fish-Mercate Clois, who had a Sword under his Coat, that dropt from him and had no Hat. This makes it impossible for any reasonable Man to believe, That Mr. Abercromby, who called at Niddery's Wynd-Head, was the Person that run off. The other who was seen at the Foot of the Fish-Mercate, with a Sword under his Coat, in a plain Man he had been using the same, and wanting a Hat, in haste running, must have been the Man. This Circumstance, join'd with another, viz. that he was seen a little after Nine, the Time libell'd

going into the Head of *Forrester's Wynd*, as shall be more fully afterwards taken Notice of, fortifies extremely the Defences mentioned.

The Pursuers complain, That the Pannel's Procurators examined the Circumstances laid down in the Libel, each by it self, and did not take them as join'd together; which was unfair in a Libel narrating the Threed of a Story. But, to gratify them as much as can be, and to do the Inditement all possible Justice, the whole Circumstances laid down to demonstrate the Pannel was the Murderer, shall be laid together; and it will plainly appear, That their Chain, even in that View, is very brittle: For, *First, It's said Mr. Abercromby left his Hat in the Room with Mr. Chieffy and the other Company: He was in another Room with the Defunct: Afterwards Two Persons were seen come out of the Cellar querrrelling; one of whom, wanting a Hat, murdered the other, and run down Blackfriars-Wynd.* All this amounts to no more, than that there lyes a Suspicion upon this Head against the Pannel: For nothing appears, but that another clothed in the Manner libelled, might have come along with the Defunct, and waited in the Entry of the Cellar, who either wanted his Hat, or might have dropt it in the Scuffle, from below his Arm, such Places are in a continual Flux of Persons going and coming: So that the only Presumption against the Pannel, is, That he is not able to prove that this, which might very probably have happen'd, was not actually the Case; that is, in other Words, He must be the Murderer, because he had not Witnesses attending, to spy every one that might have attacked Mr. Hay. If such light Suspicions were good Grounds for founding a criminal Libel, the Life of Men would be very precarious; But the Truth is, any Suspicion that can possibly be strain'd from these Qualifications, are more than taken off, when your Lordships will be pleased to consider, *1mo, The Words said to have been uttered by the Pannel to Mr. Hay, to wit, Mr. Hay sleep and wake upon it: These are such, as not only may apply to Things very remote from a Quarrel, but likewise, if taken with relation to any such Thing, is a Demonstration of the Friendship he had at that very Time to the Defunct; and taking the Quarrel he had with the other Gentleman above-mentioned, may very naturally be thought, and afford a strong Presumption, That the Defunct was desiring his Assistance as a Second, in a Quarrel he had with some other Person, who perhaps might have been waiting him in the Entry of the Cellar. 2do, Since the Murderer is libelled, and it seems can be proven to have run down Blackfriars-Wynd, and that it is offered to be proven, That this Person, or such a one as must be presumed to be he, was met at the Foot of the Fish-Merch Close; the Pannel, as indeed it is libelled, having been at the Head of Nidderys Wynd at the Time libelled: Especially join'd with this, That he likewise offers to prove, That a little after Nine, which is about the Time libelled, he was seen at the Head of Forrester's Wynd, going Home with his Wife: And the rather, since it connects with the other Circumstances that can be proven by the Company where he was, that he told them his Wife was to call him again, to go Home to his Supper. 3tio, It is not to be thought, that the Defunct would have conceal'd the Pannel's Name, had he been the unhappy Man; to be sure, it would have been the first Thing he express'd to Mr. Chieffy, who had been in Company with the Pannel: So that there lyes a Presumption, the Crime was committed by some other, either altogether unknown to him, or at least, whose Name could not so readily occur.*

It very much discredits the Proof offered by the Pursuers, That they libel nothing as to a Man of such a Stature or Shape, which is something inherent in the Person, tho' a very uncertain Mark; yet more convincing than that of Circumstances of Clothes, which every Man almost has in common with another.

As to the Prevarication hinted at in the Libel, it seems hardly worth noticing: Mrs. Johnston or her Servants, it seems, say, That the Hat which the Pannel got from them, was returned by an old Woman, and the Pannels Wife said it was sent back with a young Lass she met on the Streets. Such a Mistake might in any Event have happened; no body takes so narrow Notice of those they imploy on such Errands. And it has as little of Prevarication, that the Pannel in his Declaration asserted, That he had been nowhere after his Return from the Cellar, but in his own House, and that his Wife should have said he was in the House of one Mrs. Baptie, since in effect Mrs. Baptie's House and his own are the same; nor is there a greater Distance than that of a few Steps between them.

The 7th Circumstance laid down in the Information, is, *That when the Pannel was that Night seized in his own House, on suspicion of his being the Murderer, that the Sword which was found in the Room by him, and which was the Sword which he used that very Night, which he himself owned; was found bloody with fresh Blood; and that when he was interrogat, could give no Manner of Account why there came to be Blood upon it; and also that the Sword was somewhat*

his Circumstance, is acknowledged, carries more of Suspicion alongst with it than any of the others above set down; but then the other Circumstances, that Criminals always join with it, must be taken along, to wit, APPREHENDED and

and FOUND with the Sword so tinged with Blood, in the House or upon the Place where the Murder was committed: *Ideo Homicida putandus non est qui vestem habet cruentam, quia ex vena vel naribus potuit sanguis fluxisse*, says *Julius* in his Treatise *rei Criminalis*: And the same Thing may be said of a S because without stretching One's Fancy, many ways may be found, where Blood may come upon a Sword, without any Suspicion of Murder, unless the Person be taken upon the Spot, so that it appears that Blood could not have come any other Way, but from the Person murdered. And so *Carpsovius*, in his Treatise of *Criminals*, Part 3. *Quest. 122.* mentioning this amongst other Presumptions, expresses it thus, *Qui eo loco & tempore, temporisq; momento quo homo necatus dicitur, aut propinquo visus vel apprehensus fuerit cum armis, vel veste sanguine conspersis, nemo negabit eum reum satis suspectum esse.* So that he plainly requires the Person should be taken upon the very Spot with the bloody Sword, otherwise the Presumption arising from it can never be thought violent: He does indeed add in a following Paragraph, That when a Person is found with a bloody Sword, even in another Place, it gives a Suspicion, but Suspicion is no Proof. To apply this to the present Case, The bloody Sword libelled was not seen in his Hand near the Cellar, or Lamp-post; and therefore, at most it is only a suspicious Circumstance, and is not so much as a violent Presumption. There are many possible Events and Cases, in which the Sword might have been tinged with Blood, without making the Pannel guilty of the Murder libelled; which being so horrid a Crime, is of all the possible Ways to be reckoned the most improbable.

And whatever Presumption or Suspicion may arise from this Circumstance, it may be taken off by contrary Presumptions: And here it would be noticed, *First*, That the Sword was not about him, but lying in the Room while he was gone to Bed: Next, He did not fly; if he had, it would have been reckon'd according to the Pursuers Reasoning, almost sufficient to found a Libel *per se*; and therefore, since he did not fly, but went to Bed, 'tis a Presumption for him, stronger than that of the Sword against him, that he is an innocent Man; and what is alledged in the Libel, that his Wife should have called at the Cellar, and enquired concerning the Defunct, gives it more Weight; for since, if the Circumstance be true, it was done in Order to inform her Husband, it is not to be thought, that any Man in his right Wits, after such certain Information, would have remained in his Bed at Home, had he been conscious to himself of Guilt. Besides, is it to be thought that tho' he had, as the Pursuers alledge, trusted to the Silence of the Night, which by the by was impossible he could, since the Crime is libelled to have been done in clear Moon-Light, in the Presence and Sight of many, he could never have been such a Fool as not to have wipt the Sword, at least put it out of the Way; especially since it is not pretended that he was not in the least Emotion, but was perfectly cool and distinct, when the Magistrates of *Edinburgh* came to his House; and that 'tis further offered to be proven, that when he was in Mrs. *Baptie's* before that Time, he did not appear to be in any Disorder. This is indeed a very strong Ground of Exculpation, when a Man is so far abandoned, as to commit a Crime of this Kind,

*Fraterni Sanguinis illum conscius Horror agi!*

And for that Reason, Disorder in the Countenance and a Circumstance likewise joined with the bloody Sword, in order to make a violent Presumption: This was the more remarkable in the Pannel, because they carried him down to view and touch the dead Body, which naturally affects even the most valiant Persons, and much more must affect one conscious to himself of the Crime; and yet he behaved himself so upon that Occasion, as nothing less than a strong Conscience could have enabled him so to do. *Magna est vis conscientie in atramque mentem, ut qui nihil peccavit nihil timeat, & qui aliquid mali commiserum, semper pre oculis habere videantur.*

As to what is alledged as to the Sword's being bowed, it can be of no Weight, since that is what happens every Day by a Person's going in or out of a Door, or Twenty other Accidents of that Kind.

The last Circumstance mentioned, is the Notice taken of the Pannel's own Acknowledgement, particularly that Part of it, wherein he owns he had spoken with Mr. *Hay* the Defunct in the Cellar that Night, but pretends that he left him standing in the Trance in the Cellar.

As to this, It seems very hard to divide the Pannel's Acknowledgments, since they hang very well together, they must all be taken, or nothing founded upon them; even this would be the Rule in the Case of a judicial Deposition, much more ought it to be in an extra

sion, which in Crimes, is of no Force; and this was plainly extrajudicial, because not emitted before the Assize, before whom only the Act of Parliament allows Probation to be led.

From all this it appears, That by the Opinion of the most eminent Lawyers both at Home and Abroad, and from the Decisions of the most famous foreign Courts, the Pannel has good Reason to say, That Presumptions ought not to be sustained as a Proof sufficient, in a Libel concluding with Pains of Death, and that even, take this in it's worst View, according to the Opinion of the Lawyers, alledged by the Pursuers as Patrons of Presumptions, the Circumstances here libelled, cannot come up to what is by them required, as *indicta indubitata* or *presumptiones gravissima*, and this will be the clearer by running the Parallel between the Circumstances here laid down and the Example adduced from *Matthaus* the Advocate of their Cause: There he requires, imo, That *Titius perempti inimicus fuit, eidem sepius non solum interminatus, sed & infidatus est*: that is, That he was his Enemy, had threatened him, and formerly made attempts for his Life, let this be compared with the first Branch of the Libel, and let any impartial Man judge whether it comes up to it. It's alledged there was a *Rixa* between them in *Clockmill*, which by the Circumstances can as well be thought to proceed *ex lascivia* as even *ex calore*, which however would not be sufficient to make an Enemy: Next, what past could never leave a grudge with the Pannel, and therefore not make him *inimicus*, or an Enemy, and further they Eat and Drunk together *ex incontinenti* by themselves, which shews if ever there was any sudden Emotion or Flash of Passion, it died away of a Sudden, and this is all that is to answer to the Enmity required by *Matthaus*. As for the threatening and making former Attempts, there is not a Shadow for it in the Libel; and so these, which are the Two strongest Circumstances in the first Branch of *Matthaus's* Libel, must here go for nothing. 2do, He requires that *Titius deprehenderetur in loco caedis, cruentatus cum gladio cruento, ad mensuram vulneris facto, toto vultu expalluit, nihil respondit, trepide fugit*. That is that he be taken upon the Place where the Murder was committed, Bloody, and with a bloody Sword, in his Hand, answering to the Measure of the Wound, pale, not able to give any distinct Answer, and that he should in Confusion run off. Of all these Circumstances they have only this in the Libel, that a Sword with a little Blood was found, not upon the Place where the Murder was committed, nor even about him, and instead of libelling the Sword to agree to the Measure of the Wound, it's only said a Three edged Sword with a hollow Blade; which is just as much as saying a Sword, since of the Swords that are used upon the Streets of *Edinburgh*, there is not One of a Hundred to which this Description will not agree: It's of no Import that they call it a small Sword, for that signifies a Species in Opposition to broad Swords. Some of the other Circumstances there required, they endeavour to fix upon him by other Presumptions, so that they not only would fix the Fact of the Murder upon him *per indicia* or Presumptions, but have those even proven by other Presumptions, of which there is no End, and as little certainty. Was he Pale or in Confusion when the bloody Sword was seized? No; it's offered to be proven, he was in great Composure of Mind, he answered distinctly to all the Questions put to him. And tho' he could not account for the Blood upon the Sword, yet that is not the Meaning of what *Matthaus* requires of One's answering distinctly in such a Case, that relating only to the Composure of his Mind. And indeed, the Account he gave of his coming from the Cellar, seems to be plainly ascribed by the Defences above-proposed, and offered to be proven. Neither did he fly, which is another Circumstance required to make up *Matthaus's* Libel: Let any One compare these Two Inditements together, and let him say in his Conscience, if he thinks the Circumstances laid in this Libel come up to these of *Matthaus*: If they have less Evidence, then sure they are not a Demonstration, for his Amount to no more at best: And yet it must be owned, That less than a demonstrative Proof ought never to be sustained, because thereby the Jury run the Hazard of innocent Blood.

'Tis to be hoped, That neither the Fact, nor the Circumstances laid down in the Libel, can be proven; but allowing them to be true, as indeed they must be taken for granted in disputing the Relevancy, and the Defences not to be proven; yet it appears evidently by the Pannel's Expression libelled, That he could not be guilty of so black and villainous a Crime, as the Pursuers call it; and they may declaim as much as they please upon the Hardship of not having an Offender, as pointed out in their Inditement, brought to condign Punishment; yet 'tis certain, that if it be possible, according to the common Course of Things, that he, even under these Circumstances, may still be innocent, as 'tis undeniable he may, 'tis better a Hundred Guilty should escape, than one innocent Man be brought to die upon a Scaffold as a Malefactor. It is impossible Wickedness can be quite rooted out of the World; and according to the Advice in the Gospel, the Tares are to be left, when they are in Danger of rooting out the Wheat with them. When no positive and undeniable Proof is found, God, in His wise Providence, seems to have reserved the Judgment to Himself: Neither can Criminals thereby flatter themselves with the Hope of Impunity, as they must unavoidably appear before a Judge, whose Eyes are always upon the Works of the Earth, and will for certain give to the Wicked the Reward of their

In Respect whereof, 'tis hoped that the Inditement, in so far as it is founded upon Art and Part, and also these Circumstances laid down in the Inditement and Information, will not be sustained relevant to fix the Guilt upon the Pannel; and that the Defences laid down for him will be sustained.

2 JY 94

CHA. ERSKINE.